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Supreme Court of the United States

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No. 83-

CITY OF MISSION, SOUTH DAKOTA; AND
MISSION GOLF COURSE, INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED FOR REVIEW

Did Congress, when it excluded "fee-patented lands in non-Indian communities" from the definition of Indian country in 18 U.S.C. §§ 1154(c) & 1156, intend that the term "community" would include municipalities, such as Mission, South Dakota; and if so, whether Mission, which is incorporated and functions under State law and has a substantial non-Indian population, is "non-Indian" for purposes of those laws.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, the City of Mission, South Dakota, and Mission Golf Course, Inc., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit first entered on May 16, 1983. The Petitioners are seeking plenary review, or alternatively, summary reversal of the judgment of the lower court.

OPINIONS BELOW

The Memorandum Opinion of the District Court was filed on October 12, 1982, and is reported at 548 F. Supp. 1177. The Court of Appeals issued a Per Curiam opinion on May 16, 1983, which is unreported. On June 13, 1983, a timely filed petition by the City and Golf Course for rehearing with suggestion for rehearing en banc was denied. The preceding opinions and order appear in the Appendix in reverse chronological order at 1a through 24a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Judgment of the Court of Appeals was entered on May 16, 1983. On June 13, 1983, the Appellants' timely filed petition for rehearing was denied. By Order dated August 30, 1983, the time for filing this petition for writ of certiorari was extended

to October 10, 1983. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTES INVOLVED

The relevant statutes are 18 U.S.C. §§ 1151, 1154(c), 1156, and 1161, the important portions of which are reproduced in the Appendix at 25a-27a.

STATEMENT OF THE CASE

A. Proceedings Below.

Underlying the instant petition are two consolidated actions for declaratory and injunctive relief brought in 1980 by the United States against Mission Golf Course, Inc. and the City of Mission, South Dakota. United States v. Mission Golf Course, Inc., Civ. No. 80-3073 & United States v. City of Mission, South Dakota, Civ. No. 80-3074 (D.S.D.). The focus of these suits is whether the City of Mission and the Mission Golf Course are subject to the prohibitions and requirements of the federal Indian liquor laws (18 U.S.C. §§ 1154, 1156), and, therefore, obligated under 18 U.S.C. § 1161 to comply with the applicable Tribal liquor ordinance in order to avoid violating those laws. See Complaints, Civ. Nos. 80-3073 and 80-3074. See generally Rice v. Rehner, 51 U.S.L.W. 5141 (July 1, 1983). In defense, the City and Golf Course took the position that their liquor operations are in a non-Indian community within the meaning of §§ 1154(c) and 1156, and, consequently, not subject to the prohibitions and requirements of the liquor laws.

By Memorandum Opinion dated October 12, 1982 (App. 2a-24a), the lower court held that the Defendants City and Golf Course were within Indian country as defined for purposes of the federal liquor laws (see 18 U.S.C. §§ 1151, 1154(c), & 1156), and, therefore, subject to the prohibitions and requirements of those laws. App. at 5a. In so holding, the Court specifically concluded that the incorporated City of Mission is not itself a community within the meaning of the "non-Indian communities" provision contained in the liquor laws, and that the liquor operations of the Petitioners are not located in a non-Indian community. App. at 18a-20a. In accordance with the Memorandum Opinion, the City and Golf Course were, by Judgment first entered on October 12, 1982, permanently enjoined from selling liquor except in conformity with the applicable Tribal liquor ordinance. See 18 U.S.C. § 1161. In a per curiam opinion issued on May 16, 1983 (App. at 2a-4a), the Court of Appeals for the Eighth Circuit affirmed the decision of the lower court "on the basis of that court's well-reasoned opinion...." App. at 3a-4a.

B. The Factual Background.[1]

Both the City of Mission and Mission Golf Course, Inc. are located within Todd County, South Dakota[2] — a rural, sparsely populated area. See, e.g. Pltf. Stip., ¶¶ 5, 100; Defs. Stip., ¶¶ 1, 39; Trial Ex. 1. The present Rosebud Indian Reservation consists of all of Todd County and other lands not involved here. See, e.g., Pltf. Stip., ¶ 2; Defs. Stip., ¶ 2. See generally Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The resident tribe is the Rosebud Sioux Tribe, a federally recognized entity organized under the 1934 Indian Reorganization Act (48 Stat. 984). See, e.g., Pltf. Stip., ¶¶ 1-3.

The City of Mission, whose existence can be traced back to the early 1900's (Pltf. Stip., ¶ 111), has been incorporated under South Dakota law since 1932. See, e.g., Defs. Stip., ¶ 5; Trial Ex. 3. Although there

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1. The following references to the record will be used: "Pltf. Stip." refers to the First Stipulation of Facts, as offered by the United States (Entry No. 18 on the United States District Court docket sheet, Civ. No. 80-3073); "Defs. Stip." refers to the Stipulation of Facts offered by Defendants (docket sheet entry No. 19); "Trial Ex." refers to the documentary and photographic exhibits admitted into evidence in the District Court (see docket sheet entry No. 24); and "Trial Tr." refers to the transcript of the trial held on March 3 and 4, 1982.

2. Todd County consists of 890,870 acres, or approximately 1,392 square miles. See, e.g., Trial Ex. 127.

are four other towns in Todd County, Mission is the only such community which is incorporated and has a functioning, on-going government.[3] Defs. Stip., ¶¶ 49, 50. Because it is incorporated and operates under State law, the City is fully subject to South Dakota law governing municipalities (S.D.C.L., Title 9), and other applicable State law. See, e.g., S.D.C.L. § 9-1-2; Defs. Stip., ¶ 6. Within municipal boundaries, the City provides a number of services, including police and fire protection (See, e.g., Defs. Stip., ¶¶ 10, 11 & 14), and it owns and operates a number of facilities. See id., ¶ 17. The City has also adopted an extensive set of ordinances dealing with such matters as land use, criminal offenses, motor vehicle operation, business licenses and permits, and the provision of municipal services. See, e.g., Defs. Stip., ¶ 12; Trial Ex. 5. And, of course, the city has the authority to tax the non-exempt lands located within corporate boundaries. See, e.g., S.D.C.L. §§ 9-12-2 & 10-12-7.

According to the 1980 census, the population of Todd County — an Indian reservation area — is 7,328, of which 5,688 (or aproximately 78%) are Indian. See, e.g., App. at 11a; Trial Exhibits 13 and 31 (1980 census compilations). The population of the City of Mission,

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3. The City has an aldermanic form of government (see generally S.D.C.L. Chapter 9-8) consisting of six councilmen and a mayor, five of whom are non-Indian. See, e.g., Pltf. Stip., ¶ 65; Defs. Stip., ¶ 6.

on the other hand, is markedly less Indian: Of its 748 residents, only 376 (or approximately 50%) are Indians.[4] Id. In fact, it is safe to say that Mission contains the largest concentration of non-Indians anywhere within Todd County and hence, within the Rosebud Reservation. See, e.g., Trial Tr. at 30; Trial Exhibits 30 and 31 (1980 census compilation of enumeration districts for Todd County and map therefor). At the same time, the area immediately surrounding Mission is largely Indian, and includes a large tribal housing area located to the east of the City, known as the "Antelope Community".[5] E.g.,

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4. This has, in fact, been the pattern since the early 1900's as the County has historically been predominantly Indian while the City has not. See, e.g., Trial Ex. 46 (census data for Todd County, 1930-70); App. at 11a.

5. This housing community is located on what is known as the old Rosebud Indian Boarding School tract. See, e.g., Pltf. Stip., ¶ 17. In 1965, the Rosebud Housing Authority (RHA) - an entity established by the Rosebud Tribe pursuant to regulations of the Department of Housing and Urban Development (see generally 24 C.F.R. Part 805) - began constructing various types of HUD funded housing on this land. See, e.g., Pltf. Stip., ¶ 18; Trial Tr. at 194. There are presently over 200 housing units in the Antelope Community (see e.g., Trial Tr. at 188-89, 198), with well over 95% of the people residing therein being Indian. See, e.g., App. at 11a-12a. A variety of tribal facilities and offices are also located in or adjacent to this community. See, e.g., App. at 14a; Pltf. Stip., ¶¶ 20-24. And, the Bureau of Indian Affairs, the Indian Health Service, and the Tribe - and not the City - are responsible for

App. at 11a; Pltf. Stip., ¶¶ 13, 102 & 105; Defs. Stip., ¶¶ 55, 57 & 58. The division of land ownership in Todd County and the City follows a pattern similar to that of population: While approximately 57% of the land located in Todd County is held in the name of the United States in trust for the Rosebud Tribe or individual Indians (Trial Tr. at 299; Trial Ex. 127), only 12 of the approximately 750 lots located in Mission are held in trust. See, e.g., App. at 16a; Trial Ex. 6 (City plat with trust lots depicted).

The City of Mission, which has approximately 40 privately owned businesses within its boundaries[6] (see, e.g., App. at 12a; Defs. Stip., ¶ 53), is the commercial center of Todd County. See, e.g., App. at 12a-13a; Defs. Stip., ¶ 53. No other town in the county has any more than a handful of businesses or recreational facilities. See, e.g., Defs. Stip., ¶ 52. As a consequence, people from not only the neighboring areas but from all over the county regularly come to Mission for business or pleasure. See, e.g., Defs. Stip., ¶¶ 52, 53; Trial Tr. at 46-48, 63 & 131.

In addition to the City's municipal offices, all State and county offices and facilities in Todd County (other than the facilities of the Todd County Independent

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(cont.)

providing municipal services to this Indian housing community. See, e.g., App. at 16a; Pltf. Stip., ¶ 28; Defs. Stip., ¶ 57; Trial Tr. at 136, 155-56.

6. Of these businesses, only 15 (or 38%) are Indian-owned to any degree. App. at 12a.

School District) are located in Mission, effectively making it the county seat. See, e.g., Pltf. Stip., ¶ 67; Defs. Stip., ¶¶ 27, 28, 53 & 54. At the same time, neither the Tribe, the Indian Health Service, nor the Bureau of Indian Affairs — all of which have extensive operations and responsibilities within the Rosebud Reservation (see, e.g., Pltf. Stip., ¶¶ 20, 40-47, 68-72; Defs. Stip., ¶ 51; Trial Exhibits 60-63, 86; Trial Tr. at 115, 144) — have offices or other on-going operations or facilities in Mission. See, e.g., Defs. Stip., ¶ 9; Trial Ex. 44; Trial Tr. at 47-58. In fact, the only real services any of these entities provide within city limits are, as required by federal law, law enforcement for the Indian population and fire protection for Indian lands. See, e.g., Pltf. Stip., ¶¶ 29, 39-43; Defs. Stip., ¶ 10; Trial Ex. 37. See generally 16 U.S.C. § 594; 18 U.S.C. §§ 1151-53.

Mission Golf Course, Inc., a non-profit corporation organized under South Dakoa law, operates a nine-hole golf course and clubhouse two miles south of Mission on land it owns in fee. Defs. Stip., ¶¶ 39-43. First organized in 1964, the Golf Course was established by non-Indian residents of Mission (Defs. Stip., ¶¶ 35-37; Trial Ex. 14 at Art. 5), for the purpose of providing a recreational and dining facility for City residents. See, e.g., Trial Tr. at 258-61; Trial Ex. 14 at Art. 2. Nowadays, the Golf Course continues to be an important recreational and dining facility for City residents. See, e.g., Trial Tr. at 19-20, 32, & 227. And, as in past years, most of the current stockholders

(20 of 36) are non-Indian residents of Mission. Compare Trial Ex. 17 with Defs. Stip., ¶ 48.

With voter approval (see S.D.C.L. Chapter 35-3), the City of Mission first obtained a State liquor license for the sale of liquor off-premises in 1956[7] and has, since that time, continuously operated a package store within municipal boundaries on fee owned lands. Defs. Stip., ¶¶ 21, 23 & 24; Trial Tr. at 264-65. The Golf Course has, since it first obtained a State liquor license in 1965, sold liquor on-premises.[8] See Defs. Stip., ¶ 45; Trial Tr. at 262. The money obtained from liquor sales annually provides significant and needed operating revenues for both the City and the Golf Course. For instance, in recent years, the municipal liquor store has regularly provided well over half of the City's total

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7. In a September 28, 1951 Letter of the Acting Solicitor of the Department of the Interior to the Attorney General (Trial Ex. 10; Defs. Stip., ¶ 22), the City of Mission was recognized to be a non-Indian community within the meaning of 18 U.S.C. §§ 1154(c) & 1156, and hence, not subject to the prohibitions of those laws.

8. The 1951 Letter of the Acting Solicitor, cited in n. 7 above, also recognized that neighboring businesses serving the needs of the non-Indian community - like the Golf Course here - are part of that community for purposes of the liquor laws.

annual revenues.[9] See, e.g., Trial Tr. at 241-43; Trial Ex. 4 at 16-19; Trial Ex. 124.

In 1978, the Rosebud Tribe liquor ordinance now in effect (Tribal Res. No. 77-111), was approved by the Secretary of the Interior and published in the Federal Register, as required by 18 U.S.C. § 1161. See 43 Fed. Reg. 47291. The ordinance establishes a licensing system under the control of a liquor commission (43 Fed. Reg. at 47292, ¶¶ 2-4), and requires that licenses be renewed every year. Id. at 47295, ¶ 11. The ordinance also requires that each applicant: (1) obtain an Indian traders license (see generally 25 U.S.C. §§ 261-64 & 25 C.F.R. Part 140 (1982)), whether otherwise required or not (43 Fed. Reg. at 47295, ¶ 4); (2) obtain a $10,000 bond conditioned upon faithful compliance with the ordinance and other applicable tribal law (id., ¶ 7); and (3) agree that the premises and books will be open to inspection by the liquor commission for purposes of enforcing the various provisions of the ordinance (id., ¶ 10). At the same time, any non-Indian who obtains a tribal license will still be subject to the

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9. Because of the judgment of the District Court, the City has taken steps to establish alternative sources of revenue - namely, a sales tax and real property tax. However, whether these sources will prove sufficient is unclear largely because of the exemption from state taxation which Indians enjoy when within reservation boundaries. See generally McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

applicable requirements of state law. See, e.g., 18 U.S.C. § 1161.

Beyond the fact that prior to this litigation it was generally understood that the City and Golf Course were not subject to the federal liquor laws (see, e.g., nn. 7 & 8, supra), several aspects of the liquor ordinance itself are of particular concern to the Petitioners — a concern which is generally shared by non-Indian liquor establishments in this and other reservations. First, since it appears that the Petitioners must obtain a tribal license in order to comply with § 1161 (see Rice v. Rehner, 51 U.S.L.W. 5141), it is arguable that the City and Golf Club will be submitting themselves to tribal jurisdiction to that extent.[10] As recognized in Montana v. United States, 450 U.S. 544, 565-66 (1981) and more recently in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982), Indian tribes have civil jurisdiction, to some extent, over non-Indians who enter into consensual relations with a tribe. Applying for and obtaining a tribal liquor license is arguably just such an arrangement. And, second, by requiring that an Indian traders license be obtained, an applicant is thereby required to submit to the supervision and control of the Bureau of Indian Affairs as well. See 25 C.F.R. Part 140 (1982). This is of no small concern in light of the

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10. Indeed, the ordinance itself contains a number of provisions pertaining to the supervision and control of licensees. See, e.g., 43 Fed. Reg. at 47294 (¶¶ 23-24) & 47295 (¶¶ 7, 10).

various statutory and regulatory provisions, including the requirement that "white persons" — a term with no precise definition in this context — cannot be hired as clerks by licensees without the prior consent of the Commissioner of Indian Affairs. See 25 U.S.C. § 264; 25 C.F.R. § 140.3 (1982). This requirement for a traders license is also troubling because the Petitioners believe that they are not otherwise obligated to obtain such a license, and because these statutory provisions have never been enforced within city limits. See generally United States ex rel. Keith v. Sioux Nation Shopping Center, 634 F.2d 401 (8th Cir. 1980).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE EIGHTH CIRCUIT ADDRESSES AN IMPORTANT ISSUE OF FEDERAL LAW CONCERNING THE APPLICABILITY OF THE LIQUOR LAWS ON FEE LANDS LOCATED WITHIN THE EXISTING RESERVATIONS IN THIS COUNTRY.

Prior to 1948, it was well established that the century old federal laws prohibiting the introduction and possession of alcoholic beverages in Indian country were applicable to only those lands to which Indian title had not been extinguished. See, e.g., Clairmont v. United States, 225 U.S. 551, 557-60 (1912); Bates v. Clark, 95 U.S. 204, 207-09 (1877). See also Department of the Interior, Federal Indian Law at 386 n.1 (G.P.O. 1958). See generally Rice v. Rehner, 51 U.S.L.W., at 5143 & n.8. As a result, the liquor laws were not applicable

to non-Indians within the boundaries of a reservation while on fee lands.[11] Congress changed this in 1948 when it revised the existing liquor laws together with the laws pertaining to law and order in Indian country (18 U.S.C. § 1151-56) and, at the same time, incorporated a definition of the term "Indian country" for purposes of those laws. See 18 U.S.C. § 1151. As newly defined, Indian country was dramatically more expansive than previously construed in the case law, now including "all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent...." § 1151(a). In order to reduce the impact the 1948 law would have had on the operation of the liquor laws, Congress modified the Indian country definition the following year. See Public Law 81-72, §§ 27 and 28, as codified, 18 U.S.C. §§ 1154(c) & 1156. What Congress did was to constrict the breadth of the term by providing that for purposes of the liquor laws, Indian country "does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations...." Id.

While the statutory phrase "non-Indian communities" was, in the void-for-vagueness context, examined in United States v. Mazurie, 419 U.S. 544 (1975), the Court did not provide a definitive

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11. Prior to 1953, the sale of liquor to or possession by "ward" Indians, no matter the location, was prohibited. Compare 18 U.S.C. §§ 1154, 1156 with 18 U.S.C. § 1161.

construction of that provision. Nor have any of the lower courts thoroughly and carefully examined the provision in light of its history and purpose. Instead, so far, the non-Indian community provision has been examined on a piecemeal, case-by-case basis. The scope of the non-Indian community phrase has been the focal point throughout the instant litigation, and, as presented here, is an important question warranting plenary review.

With the proliferation of tribal liquor ordinances enacted pursuant to § 1161 in recent years (see, e.g., May, Phillip, Alcohol Beverage Control: A Survey of Tribal Alcohol Statutes, 5 American Ind. L. Rev. 217, 223-27 (1977) and post-1977 Federal Register indices), the scope and effect of the non-Indian community provision has increasingly become the subject of litigation in the federal courts. And, with the recent trend towards more vigorous federal enforcement of the liquor laws (see, e.g., United States v. Gipe, 672 F.2d 777 (9th Cir. 1982) and cases cited infra at 23), the prospects are that this trend will continue. The decision of the lower court, moreover, does not discourage this trend since it will, if left standing, invite further litigation in the area. This is likely because prior to the institution of these cases, a city or town, at least one with a functioning government, was commonly understood to be a community. See discussion infra at 18-19. However, with the instant decision, this long-standing assumption no longer holds true, leaving it open for any interested party — the United States, the

affected tribe, an individual seeking to avoid or establish federal jurisdiction — to litigate the community issue in a way which suits its position and without regard to municipal boundaries, where involved. What all this suggests is that a definitive construction by this Court is needed to avoid continued piecemeal adjudication of the non-Indian community proviso and the consequent jurisdictional confusion and uncertainty for all concerned — the tribes, the federal government, and the states and local subdivisions.

This is, moreover, not simply a matter of local concern, as the construction to be given this provision here will have an impact nationally. At present, there are well over two hundred Indian reservations recognized by the Department of the Interior (see, e.g., Dept. of the Interior, Annual Report of Indian Lands 4-42 (Sept. 30, 1981)), many of which contain substantial amounts of fee patented lands. See generally U.S. Department of Commerce, Federal and State Indian Reservations (G.P.O. 1974). And, within these opened or allotted reservation areas are a great number of small towns and cities with substantial non-Indian populations. Within South Dakota and the neighboring States of Minnesota and North Dakota alone, there are some eighteen recognized reservations (see, e.g., 1981 Annual Report of Indian Lands, supra), which together, occupy large amounts of territory — much of which is fee owned — in each of those States.

In addition, because the significance of the interpretation to be given to the term "community" in

this context is not confined to reservation boundaries, the instant litigation takes on added importance in the jurisdictional context. This is so because the construction given that term here may well have an impact on the interpretation of the same term employed in the statutory phrase "dependent Indian communities" contained in the general Indian country definition, 18 U.S.C. § 1151(b). The Eighth Circuit itself has held that the term, as employed in these two related statutory phrases, is essentially the same. See United States v. State of South Dakota, 665 F.2d 837, 839 (8th Cir. 1981), cert. denied, ____ U.S. ____ (1982); Weddell v. Meierhenry, 636 F.2d 211, 212-13 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981). See also App. at 9a. Thus, the instant case could have a substantial bearing in the dependent Indian community context, and hence, have a significant impact on those areas outside existing reservation boundaries which have large Indian populations, of which there are many.

II. THE DECISION OF THE LOWER COURTS SERIOUSLY MISAPPLIED UNITED STATES v. MAZURIE, AND, AT THE SAME TIME, FAILED TO FOLLOW THE ESTABLISHED RULES OF STATUTORY CONSTRUCTION.

A. The Misapplication of Mazurie.

Relying largely on this Court's decision in United States v. Mazurie, 419 U.S. 544 (1975), the District Court refused to consider whether the City of Mission is itself a "community" within the meaning of the non-Indian community provision contained in the federal

liquor laws. App. at 18a-19a. Instead, the District Court concluded that under the existing case law, it was obliged to examine the surrounding territory in determining whether and where there was a community. App. at 19a. In affirming, the Court of Appeals adopted the reasoning of the District Court. App. at 3a-4a.

The decision of the lower court represents a serious misapplication of the decision in United States v. Mazurie. There is certainly no question that the territory surrounding the liquor establishment in question is to be examined in determining whether or not it is within a non-Indian community. At the same time, though, this does not mean, and Mazurie does not require, that municipal boundaries — where they are involved — are to be ignored. In Mazurie, the Court did not suggest, let alone hold, that a city or town is not a community for purposes of the liquor laws. Instead, in deciding whether or not the non-Indian community provision was unconstitutionally vague, the underlying assumption was apparently that the term "community" is not limited to cities and towns (see id., 419 U.S., at 552-53)[12] — a viewpoint to which the Petitioners readily subscribe.

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12. The other decision relied upon by the lower courts, United States v. Morgan, 614 F.2d 166 (8th Cir. 1980), is to the same effect (id. at 170), and does not directly address the precise issue presented here.

B. The Statutory Construction Problem.

It is well established that in resolving issues of statutory interpretation, "[t]he underlying premise is that congressional intent will control...." Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977). See, e.g., Rice v. Rehner, 51 U.S.L.W., at 5142. Thus, where a question of statutory construction is involved, analysis should begin with an examination of the intent of Congress underlying the enactment at issue. See generally North Dakota v. United States, 51 U.S.L.W. 4240, 4243 (March 7, 1983); Rosebud Sioux Tribe v. Kneip, supra. The decision in the instant case completely avoids this threshold inquiry, relying instead on the decisions in Mazurie and Morgan alone, which, as indicated above, are not dispositive of the issue presented here.

Where, as here, Congress provided no definition, analysis is to be governed by "the fundamental canon of statutory construction that...words will be interpreted as taking their ordinary, contemporary, common meaning...." Perrin v. United States, 444 U.S. 37, 42 (1979). See, e.g., United States v. Rodgers, 51 U.S.L.W. 4621, 4630 (May 31, 1983). And, at the time of enactment in 1949, it is beyond question that one of the commonly accepted meanings of the term community was a body politic, such as an incorporated city or town. This is evidenced by the contemporary dictionaries. See, e.g., The American College Dictionary (1949); Webster's New World Dictionary (College ed. 1953); Funk & Wagnalls New "Standard" Dictionary (1949); Webster's New Collegiate Dictionary (1949);

Webster's New International Dictionary (2d ed. 1953). Adding support to this is the contemporary case law — a matter entitled to consideration here. See e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters, 51 U.S.LW. 4139, 4143 (February 22, 1983); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378 (1982). What is perhaps most significant in this regard is that the term "city" (or the like) and "community" were used interchangeably in numerous decisions of this Court — a strong indication that the commonly held assumption was that the term "community" encompassed functioning cities and towns. See, e.g., Marsh v. Alabama, 326 U.S. 501, 507-08, 509 (1946); Martin v. City of Struthers, 319 U.S. 141, 143, 144 & 148-49 (1943); Faitoute Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 510 (1942); Union Pacific Railroad Co. v. United States, 313 U.S. 450, 464-65 (1941); District of Columbia v. Murphy, 314 U.S. 441, 452 (1941); L. Singer & Sons v. Union Pacific Railroad Co., 311 U.S. 295, 305 (1940) (Frankfurter, J., concurring); Wisconsin, Minnesota, Ohio and Pennsylvania v. Illinois and The Sanitary District of Chicago, 309 U.S. 569, 570 (1940); Lone Star Gas Co. v. Texas, 304 U.S. 224, 238 (1938); Brush v. C.I.R., 300 U.S. 352, 371 (1937); Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405, 424 (1935); West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63, 65, 69 (1935); Public Service Comm'n of Montana v. Great Northern Utilities Co., 289 U.S. 130, 134 (1933); Metropolitan Railroad Co. v. District of Columbia, 132

U.S. 1, 9 (1889). See also City of Lockhart v. United States, 51 U.S.L.W. 4189, 4189 (February 23, 1983); City of Port Arthur, Texas v. United States, 51 U.S.L.W. 4033, 4034-35 (December 13, 1982); City of Rome v. United States, 446 U.S. 156, 186 n.22 (1980); City of Richmond v. United States, 422 U.S. 358, 369-73, 376 (1975); United States v. Scotland Neck City Board of Education, 407 U.S. 484, 485 (1972); Berman v. Parker, 348 U.S. 26, 32-34 (1954).

Moreover, the basic motivations for which the non-Indian community provision was enacted lend further support to the proposition that Congress understood and intended that towns and cities were to be communities within the meaning of that provision. In general, the interpretation of an act is to be guided in large measure by its underlying purposes. See, e.g., Herman & MacLean v. Huddleston, 51 U.S.L.W. 4099, 4102 n.23 (January 24, 1983); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 317 (1933). As indicated earlier, the purpose of the 1949 enactment at issue here, was "to conform [§§ 1154 & 1156] more closely to the laws relating to intoxicating liquors in the Indian country as they have heretofore been construed." H.R. Rep. No. 352, 81st Cong., 1st Sess. 6 (1949). See also S. Rep. No. 303, 81st Cong., 1st Sess. 3 (1949). And, what apparently motivated Congress to do so were the problems that on-reservation towns and cities had encountered in the liquor context as a result of the 1948 codification of the Indian country definition (18

U.S.C. § 1151). As was explained to this Court in United States v. Mazurie,

> This 1948 statutory definition permitted unobstructed control of liquor on Indian reservations, without regard to land tenure. But small towns, with predominantly nonIndian populations, located on Indian reservations, complained that the statutory definition was too broad. Prior to the 1948 Act definition, establishments in such towns had been selling liquor on fee land, in reliance on the pre-1948 Act court rulings that fee land on an Indian reservation was not Indian country. The towns wanted that privilege reinstated.
>
> Congress responded by a 1949 amendment that changed the 1948 definition of Indian country to exclude from the prohibitions of the Indian liquor laws, "fee-patented lands in nonIndian communities or rights-of-way through Indian reservations.***" Act of May 24, 1949....[13]

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13. Documentation recently discovered by Petitioners' counsel is confirmatory in this respect. See Documents lodged with the Court by the Petitioners, Exhibits 1 - 24 [hereinafter "Lodged Exhibits"]. What this documentation basically shows is that shortly after the enactment of the 1948 codification, concern was expressed as to its potential effect on the existing liquor operations in Mission. Lodged Exhibits 1-3, 5. In order to clarify, and possibly rectify, the matter, the problem confronting Mission and similarly situated on-reservation towns and cities was brought to the attention of one of the Senators from South Dakota, Chan Gurney. Lodged Exhibits 4 & 7. The Senator, in turn, brought this matter to the attention of the House Judiciary Committee in late 1948 (Lodged Exhibit 15), and, during the following months, worked with the Committee's Law Revision Counsel regarding the 1948 law and the possibilities of

Brief Amici of the Shoshone and Arapahoe Tribes of The Wind River Indian Reservation, Wyo. at 10, United States v. Mazurie, Sup. Ct. No. 73-1018. Therefore, because the non-Indian community provision was enacted specifically in response to the problems of on-reservation towns and cities, such as Mission, Congress certainly must have intended that the term "community" would encompass a "city" or "town".

C. The community of Mission is "non-Indian" for purposes of the federal Liquor Laws.

When separately considered, it can be fairly concluded that the community of Mission is "non-Indian" within the meaning of 18 U.S.C. §§ 1154(c) & 1156. The following factors are determinative in this regard: (1) The city is incorporated and functions under State law and has little to do with the Tribe and the Bureau of Indian Affairs; (2) it has had and continues to have a substantial non-Indian population; and (3) its history and background are essentially non-Indian. See

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(cont.)

revising it to rectify the problem confronting on-reservation towns and cities. Lodged Exhibits 16, 18, & 21. As a result of these efforts, the Senator received, at the end of March, 1949, "concrete assurance from the House Judiciary Committee that legislative steps will be taken to clarify the definition of Indian country...." Lodged Exhibit 18. For this purpose, the non-Indian community provision was included in H.R. 3762, as originally introduced (see Lodged Exhibits 18 & 19) — the bill which was subsequently enacted into law on May 24, 1949. P.L. 81-72, 63 Stat. 94.

discussion, supra at 4-8. This, in the view of the Petitioners, should be sufficient to establish that Mission is "non-Indian" for purposes of the liquor laws.

III. THE DECISION OF THE LOWER COURTS IS INCONSISTENT WITH THE ASSUMPTIONS OF PREVIOUS DECISIONS IN THIS AND RELATED CONTEXTS AND WITH THEIR EARLIER DECISIONS IN THE DEPENDENT INDIAN COMMUNITY CONTEXT.

While the precise issue presented here has not been directly addressed by any court, the various judicial decisions previously rendered in this and the related dependent Indian community context, have consistently recognized that functioning cities and the like are communities for purposes of the federal laws involved. See United States v. Morgan, 614 F.2d, at 170 (incorporated City of McLaughlin, South Dakota acknowledged to be a community within the meaning of federal liquor laws); Weddell v. Meierhenry, 636 F.2d, at 213 (incorporated City of Wagner, South Dakota referred to as a "community" in context of § 1151(b)); United States v. Mazurie, 487 F.2d 14, 17 (10th Cir. 1973), rev'd on other grounds, 419 U.S. 544 (1975) (term "could apply to towns..."); United States v. State of South Dakota, 7 Indian L. Rep. 3148, 3149 (D.S.D. Sept. 8, 1980), aff'd 665 F.2d 837 (8th Cir. 1981), cert. denied, ____ U.S. ____ (1982) (City of Sisseton stated to be a "non-Indian communit[y]..."); Berry v. Arapahoe and Shoshone Tribes, 420 F. Supp. 934, 940 (D. Wyo. 1976) (City of Riverton, Wyoming referred to as a community

in context of federal liquor laws). See also United States v. Mazurie, 419 U.S., at 549 n.8. Moreover, the position the United States has taken in this proceeding as to the community issue is very different from that which it has espoused in earlier cases. See Petition For A Writ of Certiorari at 9, United States v. Mazurie, No. 73-1018 (the Towns of Riverton and Lander, Wyoming acknowledged to be communities for purposes of the liquor laws); Brief for the United States at 13, United States v. Mazurie ("ordinary meaning" of the term assumed to be the focus); Brief for the United States at 10 & 11, United States v. Morgan, 8th Cir. Nos. 79-1427, et al. (asserted that the locale under consideration — Mahto —was not a community because it was "not incorporated" and that it had no "town government of any kind"; commonly accepted meaning of the term assumed to be the focal point). It is evident then, that the approach taken by the lower courts and the United States in the instant proceeding is inconsistent with that espoused in previous cases. Therefore, because case-by-case adjudication has not resulted in the development of a consistent approach to the non-Indian community issue, there is a need for the Court to provide definitive guidelines for future litigation in this context.

The decision of the courts below also directly and substantially conflicts with several of their earlier decisions rendered in the related dependent Indian community context, United States v. State of South Dakota, 665 F.2d 837 and United States v. Mound, 477

F. Supp. 156 (D.S.D. 1979).[14] A critical aspect of the decision under review is the conclusion that the tribal housing project (known as the "Antelope Community") located near — but outside — city limits and Mission were one "community" for purposes of the liquor laws. App. at 19a-20a. In application of the "dependent Indian communities" provision (18 U.S.C. § 1151(b)), the same courts have taken an approach which is directly at odds with that taken in the instant proceeding. More specifically, in both United States v. State of South Dakota and Mound, it was found that two Indian housing projects identical to the Antelope Community are, by themselves, communities. See United States v. State of South Dakota, 665 F.2d 837; United States v. State of South Dakota, 7 Ind. L. Rep. 3148; Mound, 477 F. Supp. 156. That there is, in fact, a direct and substantial conflict between the instant decision and these dependent Indian community cases is demonstrated by the fact that the tribal housing projects held to be separate communities in the latter cases were either located within or adjacent to incorporated municipalities. See United States v. State of South Dakota, 665 F.2d, at 838 (tribal housing project located in the incorporated City of Sisseton, South Dakota);

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14. As mentioned earlier, the Eighth Circuit has indicated that the term "community" as employed in §§ 1154(c) & 1156 is essentially the same as that contained in § 1151(b). See discussion, supra at 16.

United States v. State of South Dakota, 7 Ind. L. Rep., at 3148 (same); Mound, 477 F. Supp., at 158 (tribal housing project located adjacent to the incorporated Town of Eagle Butte, South Dakota). Compare Morgan, supra, 614 F.2d, at 170 with e.g. Trial Ex. 26c (tribal housing project located adjacent to the non-Indian community of McLaughlin, South Dakota — an incorporated city — not treated as part of that community for purposes of the liquor laws). Indeed, this conflict is particularly dramatic with respect to United States v. State of South Dakota — a case which this Court declined to review last term — since the tribal housing project at issue was explicitly recognized as having, like the Antelope Community, substantial social and economic connections with the neighboring municipality. Compare United States v. State of South Dakota, 665 F.2d, at 841 and United States v. State of South Dakota, 7 Ind. L. Rep., at 3148-3149 with App. at 20a. As the District Court (Porter, J.) observed in that case, the fact that "the Indians were substantially integrated with non-Indians in a business and social community. . ." cannot defeat a finding of Indian country. Id., 7 Ind. L. Rep., at 3149.

It is evident then, that both the Eighth Circuit and the District Court have been inconsistent in their treatment of the community issue, apparently interpreting the term in a manner which best favors federal jurisdiction. The net result of this conflict is that the overall intent of Congress has not been served, but has, in fact, been undermined. Moreover, the

inconsistency among the decisions in the dependent Indian and non-Indian community contexts has caused, and will likely continue to cause, significant confusion administratively, not only for state officials, but for federal and tribal officials as well. Thus, an authoritative interpretation of the non-Indian community provision by this Court is needed in order to avoid the inconsistencies — and the consequent jurisdictional uncertainties — which have resulted from case-by-case adjudication of that phrase and the related dependent Indian community provision.

IV. THE DECISION OF THE LOWER COURT WILL, IF LEFT STANDING, RENDER THE NON-INDIAN COMMUNITY PROVISION A VIRTUAL NULLITY.

As indicated earlier, the District Court held — with the Court of Appeals affirming — that it was obliged to treat an amorphous area including Mission and the surrounding territory as the "community" to be examined for purposes of the liquor laws. App. at 18a-19a. Not only is this an unnecessarily constrained application of that term, but will, if allowed to stand, effectively nullify the non-Indian community provision.

The decision of the lower court is apparently based upon the assumption that a community is a monolithic entity which is mutually exclusive of other communities. In reality, because the term is commonly regarded as a flexible one, nothing could be farther from the truth. Generally speaking, a community can

be located within a larger community, or overlap with other communities, whatever their nature may be. See, e.g., dictionaries cited, supra at 18-19. And, in regard to the application of the federal liquor laws, Congress understood and intended as much since non-Indian communities are, by definition, located within or overlap with the larger reservation community. Compare 18 U.S.C. § 1151(a) with §§ 1154(c) & 1156. Therefore, because the operative assumption of the court below was that communities are mutually exclusive, the instant decision runs contrary to and hence, defeats the intent of Congress underlying the non-Indian community provision.

Moreover, by assuming that communities are separate, monolithic entities, the decision below will, carried to its logical extent, nullify the non-Indian community exception, except in those rare instances where it can be shown that the area in question is a discrete enclave isolated from the surrounding Indian reservation community. This follows from the fact that Indian reservations have traditionally been regarded as "'distinct communit[ies], occupying [their] own territory. . . .'"[15] Rice v. Rehner, 51 U.S.L.W., at 5142, quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Accord McClanahan v. State Tax

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15. And logically, it is within this community that the mutuality of interest among tribal members (e.g., culture, custom, and tribal government) is generally at its strongest.

Commission of Arizona, 411 U.S., at 168; Williams v. Lee, 358 U.S. 217, 219 (1959). See also DeCoteau v. District County Court, 420 U.S. 425, 464 (Douglas J., dissenting) (Indian tribe is a "political community"). Under the rationale of the lower court, any substantial interaction, economic or otherwise, between the non-Indians of a particular locale and the Indian reservation community, effectively makes them one community for purposes of the liquor laws. Thus, in view of the fact that the Indian community ordinarily interacts reservation-wide, rarely could a non-Indian locale — particularly where substantial commercial services are provided, as is the case in Mission (App. at 12a-13a) — be considered a separate community. Instead, under the instant decision, such areas will often be lumped together with the interacting Indian community as one community for purposes of the liquor laws. Such a result runs contrary to both the intent of Congress and the usual understanding of the term "community."

In enacting the non-Indian community provision, Congress plainly intended that the term "community" would have substance. However, under the decision below, the term is largely without limits and thereby effectively deprived of any vitality. And, because the scope of the term is, within reservation boundaries, far from clear, there is — and will continue to be — considerable uncertainty regarding the application of the non-Indian community provision. It is evident then, that the lower courts have failed to develop a realistic, workable definition of the term "community."

V. THE PETITION CAN BE APPROPRIATELY DISPOSED OF BY SUMMARY REVERSAL.

Because the decision of the lower court was plainly in error, summary reversal is warranted. Summary reversal is generally reserved for those cases in which the decision below is clearly in error. See generally Stern & Gressman, Supreme Court Prac., § 5.12 at 362-63 (5th ed. 1978). Although such a disposition is relatively rare, the Petitioners suggest that the question of whether a municipality, such as Mission, is a community for purposes of the federal liquor laws can be appropriately disposed of by summary reversal. As the preceding discussion demonstrates, it is readily apparent that the lower court wrongly decided this issue.

In the event that the lower court's disposition of the community issue is summarily reversed, it will remain for the court below to determine whether the City of Mission, as a community for purposes of the liquor laws, is "non-Indian" (see, e.g., United States v. Morgan, 614 F.2d, at 170), and whether the Mission Golf Course is a part of that non-Indian community for purposes of the liquor laws. See id., 614 F.2d, at 170-71. Thus, it will be necessary to remand the instant cases for further proceedings consistent with the Court's disposition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated this 7th day of October, 1983.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2516-SD, September Term 1982

United States of America, Appellee,

vs.

Mission Golf Course, Inc., Appellant,

* * * * * *

United States of America, Appellee,

vs.

City of Mission, Appellant.

Appeal from the United States District Court for the District of South Dakota

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

It is further ordered by this Court, that appellants' motion for stay of issuance of mandate pending certiorari proceedings, be and is hereby, denied.

June 13, 1983

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2516

United States of America, Appellee,

v.

Mission Golf Course, Inc., Appellant,

* * * * *

United States of America, Appellee,

v.

City of Mission, Appellant.

Appeal from the United States District Court for the District of South Dakota

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Submitted: April 11, 1983

Filed: May 16, 1983

Before ARNOLD and BENNETT,* Circuit Judges, and HENLEY, Senior Circuit Judge.

PER CURIAM.

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*The Honorable Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by designation.

Appellants City of Mission and Mission Golf Course, Inc., both of which operate liquor-dispensing establishments within the boundaries of the Rosebud Sioux Indian Reservation, seek reversal of the district court's[1] judgment enjoining them from selling intoxicating beverages except in compliance with a tribal liquor ordinance. See 18 U.S.C. § 1161. They contend the district court erred in concluding (1) that neither appellant fell within the "non-Indian community" exception included in the federal statute regulating the sale of alcoholic beverages on Indian lands, see 18 U.S.C. § 1154(c), and (2) that the tribal liquor ordinance, in the circumstances of this case, was not violative of the fifth amendment.

We have carefully examined the briefs and record in this matter, and conclude that the district court's findings are not clearly erroneous and that no error of law appears.[2] Accordingly, we affirm on the basis of

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[1]The Honorable Donald J. Porter, United States District Judge for the District of South Dakota.

[2]Appellants also argue that the district court improperly allocated the burden of proof with respect to the "non-Indian community" issue by requiring appellants to prove that they were within such a community. It is far from clear that any misallocation occurred, but assuming arguendo that it did, we are satisfied that the outcome in connection with this issue was not affected. It appears that the government believed that it bore the burden of proof on this issue, and the record indicates that ample evidence was presented demonstrating that appellants did not fall within the statutory exception.

that court's well reasoned opinion. See 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
District of South Dakota

CENTRAL DIVISION

October 12, 1982

CIV. 80-3073
UNITED STATES OF AMERICA VS. MISSION GOLF COURSE, INC.
and
CIV. 80-3074
UNITED STATES OF AMERICA VS.
CITY OF MISSION

MEMORANDUM OPINION

CASE SUMMARY

Plaintiff United States brought these two actions, seeking to enjoin defendants Mission Golf Course and the City of Mission from the sale of any intoxicating beverage on the Rosebud Sioux Indian Reservation except in conformity with the liquor ordinance adopted by the Rosebud Sioux Tribe. Having found that the evidence presented at the trial of these two cases fails to establish[1] that defendants are located in a "non-Indian community" within the meaning of 18 U.S.C. §§ 1154, 1161, the Court must grant the permanent injunction plaintiff seeks.

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1 United States v. Morgan, 614 F.2d 166, 169 n.8 (8th Cir. 1980).

LEGAL BACKGROUND

The first statute governing the determination of this case is 18 U.S.C. § 1154, which provides in pertinent part that:

> (a). . .whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than$2,000 or imprisoned not more than five years, or both.
>
> (c) the term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

The second statute which has application here is 18 U.S.C. § 1161:

> The provisions of sections 1154 . . . of this title shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

Only a few cases have attempted to define precisely what is a "non-Indian community", as that

term is used in this statutory framework. The leading case, United States v. Mazurie, 419 U.S. 544 (1975) found that a bar located on the outskirts of Fort Washakie, Wyoming, within the boundaries of the Wind River Reservation, was not located in a non-Indian community. The court noted that Fort Washakie was the location of the Wind River Agency of the Bureau of Indian Affairs, and of the Tribal Headquarters of the tribes on the reservation; that the population within the 20 square miles surrounding the bar was heavily Indian, that the students in the public school serving Fort Washakie were mostly Indian; and that the bar was "near a public housing development populated largely if not entirely by Indians." 419 U.S. at 552. The Court concluded from this evidence that, "[g]iven the nature of the [bar's] location and surrounding populations, the . . . bar was not excepted from tribal regulation by virtue of being located in a non-Indian community." 419 U.S. at 553.

A somewhat more detailed exposition of this subject was made in United States v. Morgan, 614 F.2d 166 (8th Cir. 1980). Two liquor establishments within the Standing Rock Sioux Indian Reservation in South Dakota were there under consideration: one at a locality called Mahto ten miles east of McLaughlin, South Dakota, and one called the Cattleman's Saloon, three-quarters of a mile from McLaughlin. (It was recognized in the opinion that McLaughlin was a non-Indian community.) Mahto, historically, had been inhabited predominantly by non-Indians; of the 27 people using

Mahto as a polling place, 24 were non-Indian; it was claimed that 95 percent of the business at the bar was non-Indian; the law and order and other governmental services were provided by the county and township, rather than by the tribe and United States; the former public school at Mahto had been used by almost entirely non-Indian pupils; and it appeared that few Indians did business in Mahto. The court found that Mahto was a non-Indian community:

> The federal statute uses the term "community" and not "town," "city" or incorporated entity with a minimum population. Basic to the definitions of "community" which we have reviewed is the existence of an element of cohesiveness. This apparently can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality. Cohesiveness or common interests can be more necessary to the existence of a community than can mere density of population. We believe that the political and social focal point which the Mahto locality provides year round for the surrounding township could give a man of average intelligence the understanding that as an inhabitant in this area, he lived in a "community." As a large percentage of such inhabitants are non-Indian and the history and background of the area is non-Indian, we believe it can be said that Mahto is a community serving the non-Indian inhabitants of the township.

614 F.2d at 170. As for the Cattleman's Saloon, the court observed that this establishment was entirely surrounded by deeded non-Indian land, all governmental services to the bar were from the nearby town of McLaughlin, and 70 percent of the bar's business came from non-Indian residents of McLaughlin. In the court's

view, the Cattleman's Saloon was part of the non-Indian community of McLaughlin "even though it is not technically within the town's incorporated boundaries. The statute's exception requires only that [the] business be 'in a non-Indian community itself. [The] business serves the area of McLaughlin and is in all respects within that community of interest and influence.'" 614 F.2d at 170-71.[2]

Though not directly on point, several other cases deal with the question of what constitutes a dependent Indian community under 18 U.S.C. § 1151(b), and establish factors which are relevant to the Court's inquiry here. United States v. State of South Dakota, 665 F.2d 837 (8th Cir. 1981); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980); United States v. Mound, 477 F.Supp. 156 (D.S.D. 1979).

Taken together, the cases cited, supra, dictate several points to be considered in deciding what is a non-Indian community. These factors are principally:

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[2] A third case, discussed by the court in Morgan, is Berry v. Arapahoe & Shoshone Tribes, 420 F.Supp. 934 (D.Wyo. 1976), where the court found that a liquor establishment was not within a non-Indian community. The area at issue in Berry was rural, and although there were no Indians living within three miles of the business, there were Indian residents within five miles, the nearest community of any size was thirty miles away, and the area around the business had historically been subject to tribal and federal jurisdiction and generally regarded as part of the reservation.

(1) Racial composition of the population in the area, both historically and at the present time, and the extent of this population's use of area services other than the liquor establishments at issue;

(2) A comparison of the roles of state, federal, and tribal governments in the area;

(3) Title to the land in the area; and

(4) Racial composition of the clientele of the establishments selling liquor.

The Court will therefore turn to an examination of the evidence in this case in light of these factors.

FACTUAL DISCUSSION

I.

Racial Composition of the Area Population in the Past.

The City of Mission is located in Todd County, South Dakota, within the exterior boundaries of the Rosebud Sioux Indian Reservation. (The boundaries of Todd County correspond with the Reservation boundaries with the exception of certain lands and/or communities in Mellette, Gregory, Tripp and Lyman Counties). The City, which is 15 miles from the northern boundary of Todd County, 22 miles from the southern boundary, 23 miles from the eastern boundary, and 30 miles from the western boundary, was originally platted in about 1913 in the vicinity of St. Mary's Mission, after which the City was named. The Rosebud Indian Boarding School, operated by the United States, a Catholic Church, and an Episcopal Church were also located in

the area. Willis Groves, a witness called by defendants, moved into Mission in 1917, and testified that of the few businesses in Mission at that time, six were non-Indian, and four were Indian. The City was incorporated under South Dakota state law in 1932. The 1940 census shows that there were 307 non-Indians and 145 Indians then living in Mission, or a 33% Indian population. There is apparently no breakdown in the 1950 census, but the 1960 report shows 337 non-Indians and 274 Indians in Mission, or a 44.7% Indian population. In 1970, there were 438 non-Indians and 301 Indians, or a 41% Indian population.

The population of Todd County as a whole since 1930 appears to have been roughly as follows:

1930 — 47% Indian	53% non-Indian
1940 — 54% Indian	46% non-Indian
1950 — 56% Indian	44% non-Indian
1960 — 58% Indian	42% non-Indian
1970 — 70% Indian	30% non-Indian.

Racial Composition of the Area Population.

According to the 1980 census, the City of Mission had a population of 748. Of that total, 376 or 50.28% of the City population was Indian. Also, according to the 1980 census, Todd County as a whole had a population of 7,328, with 5,688 or 77.6% of the County population being Indian. In the two 1980 census districts immediately to the east of the City of Mission, which seem to consist principally of a tribal housing development known as Antelope Community, there is

an additional population of 757 people, of whom 717 or 97% are Indian. In the 1980 census district immediately to the south of the City of Mission, which seems to consist mainly of a complex of Todd County school buildings, with housing for teachers, federal government personnel, and some students, there is a total population of 232, of whom 110 or 47% are Indian.

Use of Area Services Other Than the Liquor Establishments At Issue.

Of the approximately 40 privately owned businesses in the City, 15 are owned by persons of at least some degree of Indian ancestry. There was somewhat conflicting testimony as to the proportional use of these businesses by Indians and non-Indians, with the owners of the Mission Shopping Center, the bowling alley (which includes a restaurant, dance area and bar under license of the City), a motel, laundry and drive-in, indicating that from 75% to 90% of their business is derived from Indians. On the other hand, the owners of the auto parts store, a service station, feed and seed store, a lumber and hardware business, a department store, and the manager of a Farmers Co-op Oil Association indicated that from 20% to about 45% of their business was derived from Indians.

The evidence established that the City of Mission was the principal shopping area for the large Indian population in the nearby housing development of Antelope Community, the inhabitants of the school and government housing complex to the south and, indeed,

the testimony clearly showed that the City of Mission is the commercial focal point of Todd County.

Antelope Community, the evidence showed, is also almost completely devoid of non-commercial services, and the Indian people living in Antelope Community regularly go the City of Mission to pick up their mail, to participate in the state Aid to Dependent Children program, to obtain aid from Dakota Plains Legal Services (which has a clientele of from 85% to 90% Indian), and to go to church. Further, the children of Antelope Community attend the public schools in and around the City of Mission. Todd County High School, located just to the south of the City, serves the entire county and has an Indian enrollment of 294, and a non-Indian enrollment of 92. A number of Indian students, 52 at the time of the trial, live in a dormitory on the High School grounds.

It might also be noted that of the six members on the Mission City Council, two are Indian, and of the five Todd County School Board members, all elected at large in Todd County, two are Indian.

II.

Comparative Roles of State, Tribal and Federal Governments.

State. The City of Mission is incorporated and organized under South Dakota law, and is regularly audited under state law. The City has a police force, and maintains a municipal jail, a gymnasium, a fire hall, a municipal office, and a municipal swimming pool and park. The

City maintains its own streets, water and sewer system. (A new sewer system for the joint use of the City and Antelope Community is planned.) A number of state and county offices are also located in the City, including offices of the State Department of Social Services, and the State Department of Public Safety, the County Assessor, the Sheriff and the Civil Defense officer. The City of Mission also has a volunteer fire department, with equipment purchased by the City. It should be noted, however, that the City cooperates with the Bureau of Indian Affairs (BIA) in fire protection, and an agreement exists whereby the Mission volunteer fire department is reimbursed by the BIA for certain of its costs in fire fighting on Indian land. The State has criminal jurisdiction only over crimes committed by non-Indians against non-Indians.

Tribal. There appear to be no tribal offices located within the City of Mission itself. There are several tribal offices located in Antelope Community, however, including a tribal lumber company, a commodity warehouse, a school for the mentally retarded, a Headstart Center, and an alcohol recovery center. There is also a tribal child welfare program administered at the Todd County High School complex. The housing in Antelope Community itself was constructed by a tribal entity beginning in 1965, and this entity continues to administer some of the housing. The Indian people of Antelope and the City of Mission together elect five representatives to the Rosebud Sioux Tribal Council and also elect the members of a community organization.

An unmanned airport near the City of Mission was built on tribal land, and is maintained by the tribe. The state sales tax collected by the businesses in the City of Mission is distributed 75% to the tribe and 25% to the state, pursuant to an agreement between the tribe and the State of South Dakota.

The Tribe exercises jurisdiction over misdemeanor crimes involving Indian defendants throughout Todd County and including the City of Mission.

Federal. There are no federal government offices within the boundaries of the City of Mission; however, there are a substantial number of Bureau of Indian Affairs offices located in the Todd County High School complex. The BIA owns a number of the buildings in the complex.[3] It maintains a Social Services branch, and Education branch, Facility Management branch, and Employment Assistance branch at the complex, and plans to move a considerable number of its functions to the complex in the next two years. At present, the BIA Social Services office at the complex administers assistance to 400 families in the area. The BIA maintains a dining room at the complex which serves morning and evening meals to the Indian students living in the dormitories at the complex, and serves lunches to the entire school

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[3] 28 government quarters, 1 fourplex apartment, 1 fourplex garage, 1 fire station, 1 maintenance shop, 2 - 160 pupil dormitories, 1 kitchen dining hall, 2 - 2 stall garages, 1 water tower, 2 pump houses, 1 fire truck, and approximately 11 acres of land.

population. The Indian Health Service (IHS) also operates a dental office within the High School complex. The Todd County School System receives federal funds for the purpose of providing supplementary education services to Indian children.

The BIA administers programs to help Indian people get started in business; several of those so helped are in business in the City of Mission. Municipal services in Antelope Community Housing Development, including police protection, water and sewer services, and road maintenance, are provided by the BIA, the IHS, and the Tribe, and fire protection is provided jointly by the BIA and the Mission volunteer fire department.

All felonies committed by an Indian, or any offense by a non-Indian against an Indian, at any location in Todd County, including the City of Mission, are under the jurisdiction of the United States. 18 U.S.C. §§ 1152, 1153, 13.

III.

Title to Land in the Area.

All land within the City of Mission, except for approximately twelve lots, is owned in fee simple by individuals, churches, corporations, or governmental units (including the land where the Mission municipal liquor store is located). The property where defendant Mission Golf Course is located is also held in fee simple.

The evidence on land title in Todd County as a whole is conflicting. A report compiled by the Bureau of Indian Affairs showed a total of 890,495 acres in

the county, with 582,625 acres or 65% held in trust by the United States for the tribe or individual Indians. A report prepared by the Todd County Director of Equalization, on the other hand, showed a total of 890,870 acres in the county, with 504,815 acres or about 57% held in trust.

IV.

Racial Composition of the Clientele of the Establishments Selling Liquor.

Mission Municipal Liquor Store. In 1956, the people of the City of Mission voted to permit the City to obtain a license from the state for the sale of liquor and the license was obtained in that year. There was no precise evidence as to the usage of the liquor store, but the testimony did tend to establish that the store's patronage was largely, perhaps in the range of 80%, Indian, representing customers not only from the immediate Mission area but from throughout the reservation.

Mission Golf Course. The Mission Golf Course was incorporated in March, 1964, under South Dakota law. It is located about two miles south of the City of Mission. All of the seven incorporators were from Mission; none were Indians. There were sixteen original shareholders; one was Indian. The club house on the golf course has operated under a state liquor license since 1965.

There are currently 36 stockholders in the golf course, of whom five are Indian. Of the approximately

280 current members, the percentage of Indian members was generally agreed to be about 50%. The golf course serves all of Todd County. The precise percentage use of the golf course facilities is rather unclear, although it appeared that fewer Indians used the golf course itself than did non-Indians. As for the club house, where liquor is served, the average percentage of use by Indian patrons seems to range from 50% to 65%, with greater or lesser percentages depending on the time of the week.

LEGAL DISCUSSION

I.

The Court has little difficulty in finding from the evidence briefly outlined above that defendants City of Mission and the Mission Golf Course are not located within non-Indian communities, as that term is defined in the statutes and case law.[4] Defendants seem to

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[4] It is true that a 1951 United States Department of Interior memorandum finds that Mission was a non-Indian community. Whatever the validity of this finding in 1951, it is of little significance more than thirty years later. It is fundamental that as the needs and circumstances of Indians change, so must "the method of supervision over them by the United States . . . change." United States v. Mound, 477 F.Supp. 156 (D.S.D. 1979).

Defendants also rely on a 1971 opinion of the South Dakota state Attorney General that Mission was exempt from the federal liquor statutes. This letter is unpersuasive, and is not binding upon this Court.

imply that this Court is limited solely to an examination of the City of Mission within its legal boundaries. Yet, every case dealing with the concept of a "non-Indian community" has looked to the surrounding territory. In Mazurie, the Supreme Court considered the nature of the twenty square miles surrounding the bar, and found it to be primarily Indian; here, the population within just a few square miles around the defendants is primarily Indian. In Mazurie, the schools serving the area were attended predominantly by Indians; the same must be found here. In Mazurie, the bar was near public housing inhabited almost entirely by Indians; here again, the same is true. Unlike the locality of Mahto in Morgan, the Mission area seems to have always had a very substantial, and now predominantly, Indian population; unlike Mahto, the majority of the patrons of the liquor establishments at Mission are Indian; unlike Mahto, the tribe and the United States provide at least part of the law and order services in the City of Mission; and unlike Mahto, great numbers of Indians do their business in the Mission area. As the Eighth Circuit said in Morgan, "[b]asic to the definitions of 'community' . . . is the existence of an element of cohesiveness." 614 F.2d at 170.

The sum total of the various ways the Indian presence in Mission is manifest demonstrates "an element of cohesiveness" which is inconsistent with a view of Mission and surrounding area as a "non-Indian community." It is true that there are substantial non-Indian elements to the area, but it cannot be said that

these elements predominate. Put in the terms used in Morgan, the business, educational and social "focal point which the [Mission] locality provides year round for the surrounding [housing areas, and indeed, county] could give a man of average intelligence the understanding that as an inhabitant in this area, he lived in a 'community.' Id. Given the totality of evidence in this case, defendants have failed to prove that this 'community', which includes the City of Mission and surrounding environs, is "non-Indian."

II.

Defendants also raise, but do not strongly press, the contention that the two liquor establishments, or at least the Mission liquor store, are in relatively close proximity to a highway, and thus come under the other exception in 18 U.S.C. § 1154(c) of a right-of-way through a reservation. The establishments, however, are not directly in the highway itself, and there is no evidence that the entity holding title to or right to possession of the highway right-of-way has, or will authorize defendants to use any portion for the sale of liquor.

Moreover, this issue was not raised at trial and is thus not properly before the Court. The contention is overruled.

III.

Defendants further raise a number of separate issues under the due process and equal protection clauses of the United States Constitution with regard to the power of the Tribe to regulate defendants' liquor sales.

First, defendants point out that non-members of the Tribe cannot vote in Tribal elections, and seize upon the trial testimony of one Tribal council member that he would never vote to place a non-member of the Tribe on the Tribal Liquor Commission. Assuming that fictional "persons" such as the City and the Golf Course have standing to urge a claim of racial discrimination, it must still be observed that the Tribal liquor ordinance, Vol. 43, Fed.Reg. #199, Oct. 13, 1978, p. 47,291, does not expressly restrict service on the liquor commission to Tribal members. The evidence suggests that non-Indians have been appointed on the board of the Rosebud Housing Authority, another Tribal entity, and the statement of one tribal counsel member cannot be taken to represent tribal policy. The evidence, therefore, does not support defendants' claim, and the issue must be resolved in plaintiff's favor. See also Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 69-70 (1978); United States v. Mazurie, supra, 419 U.S. at 557.

Defendants argue that the language of the Tribe's liquor ordinance would improperly impose liability on "a vendor who legally sells intoxicants to a sober person who subsequently gives the intoxicants to a friend or relative who later becomes intoxicated by drinking the liquor and is involved in an accident." The language of the two sections giving rise to this purported result states, in Section 8 of Chapter 19, that the applicant for a liquor license must have insurance that will pay claims "which the applicant shall become legally obligated to pay as damages because of bodily injury,

property damage, or death proximately caused to himself or others by any person who becomes intoxicated by the consumption of alcohol sold by the applicant;" Section 9 of Chapter 19 states that any "person suffering bodily injury, property damage, or death proximately caused by any person becoming intoxicated by the consumption of alcohol sold by the applicant shall have a cause of action against the applicant for such damage sustained." (Emphasis supplied). It is the Court's view that the use of the term "proximate cause" in the ordinance clearly restricts a liquor store's liability to proper limits; as the legal definition of "proximate cause" implies, the liquor sale must be a cause of the damage and have created a condition or chain of events which was continuous and active up to the time of the damage, with the lapse of time between the sale and the damage being taken into account. In this light, then, there is no merit to the assertion that "causation is not a factor in the tribal ordinance," and defendants' allegations on this issue must be rejected.

Finally, defendants contend that Section 4 of Chapter 19 of the liquor ordinance requires all corporations seeking a tribal license to be organized under the laws of the Tribe. The City of Mission apparently argues that it is legally impossible for it to organize under Tribal law, but whether such organization is in fact barred to the City, the Court has no difficulty in finding that defendants have misread the ordinance. Section 4 states:

> Any corporation seeking a license for the sale of liquor must be a corporation organized under the laws of the Rosebud Sioux Tribe, provided, however, that if the applicant is a foreign corporation, it shall be eligible if, prior to the application, it has complied with the laws of the Rosebud Sioux Tribe and the United States concerning doing business within the Rosebud Reservation.

Section 35(3) of Chapter 17 of the Ordinance defines foreign corporation as "any corporation not incorporated under the laws of the Rosebud Sioux Tribe." There appears no reason why the City cannot qualify as a "foreign corporation" under these sections, nor have defendants shown any reason why it would be impossible for the City to comply "with the laws of the Rosebud Sioux Tribe and the United States concerning doing business within the Rosebud Reservation." The Court, accordingly, can see no basis for the contention that Section 4 of Chapter 19 would necessarily "prohibit the issuance of a liquor license to the City of Mission;" thus, this issue too must be resolved against defendants.

For all the reasons given, therefore, judgment must be entered for plaintiff, and defendants are permanently enjoined from any sale of any intoxicant, except in conformity with the tribal liquor ordinance, and South Dakota law.

This memorandum opinion constitutes the Findings of Fact and Conclusions of Law of the Court.

BY THE COURT:

/s/ Donald J. Porter

UNITED STATES DISTRICT JUDGE

18 U.S.C. § 1151, Indian country defined

Except, as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same, June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, § 25, 63 Stat. 94.

18 U.S.C. § 1154. Intoxicants dispensed in Indian country

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinous liqour, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of

the Government, under charge of any Indian superintendent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and whoever introduces or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * *

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139 § 27, 63 Stat. 94.

18 U.S.C. § 1156, Intoxicants possessed unlawfully

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for

each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 759; May 24, 1949, c. 139, § 28, 63 Stat. 94.

18 U.S.C. § 1161, Application of Indian liquor laws

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not aply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, § 2, 67 Stat. 586.

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No. 83-606

In the Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF MISSION, SOUTH DAKOTA AND MISSION GOLF COURSE, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly determined that petitioners' liquor establishments are not located upon "fee-patented lands in non-Indian communities," and accordingly are not exempt from federal Indian liquor laws.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 2a-4a) is unreported. The district court's opinion (Pet. App. 5a-24a) is reported at 548 F. Supp. 1177.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1983, and a timely petition for rehearing was denied on June 13, 1983 (Pet. App. 1a-4a). By order of Justice Blackmun, dated August 30, 1983, the time for filing a petition for a writ of certiorari was extended to October 10, 1983. The petition was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, the City of Mission and Mission Golf Course, Inc., each operate a liquor-dispensing establishment within the exterior boundaries of the Rosebud Sioux Indian Reservation in South Dakota. They seek review of a judgment holding that they must comply with federal laws regulating sales and possession of liquor within Indian country, including the requirement that they comply with tribal law.

Sections 1154 and 1156 of Title 18 of the United States Code generally prohibit the selling or possession of alcoholic beverages in "Indian country." Although, for most purposes, "Indian country" encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government," regardless of non-Indian land ownership or population (see 18 U.S.C. 1151(a)), a more restrictive definition governs here. Pursuant to the Act of May 24, 1949, ch. 138, §§ 27 and 28, 63 Stat. 94, Sections 1154 and 1156 each provide that "the term 'Indian country' as used in this section does not include fee-patented lands in non-Indian communities * * *." By the Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586, Congress permitted the sale of liquor even within "Indian country," as narrowly defined, but only —

> provided such act or transaction is in conformity both with the laws of the State in which the act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

18 U.S.C. 1161.

In conformity with this statute, the Rosebud Sioux Indian Tribe, a federally recognized tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. 476 *et seq.*, adopted a liquor ordinance in 1978. On October 13,

1978, the text of the ordinance, approved by the Secretary of the Interior, was published in the Federal Register (43 Fed. Reg. 47291). The liquor ordinance requires vendors of liquor on the Rosebud Reservation to acquire a tribal liquor license.

2. The City of Mission is an incorporated city under South Dakota state law and lies within the boundaries of the Rosebud Sioux Reservation (Pet. App. 10a-11a). The City operates a package liquor store within city limits. Approximately 80% of the City's liquor customers are Indian (Pet. App. 17a). Mission Golf Course is located approximately two miles south of city limits, also within the Rosebud Reservation (Pet. App. 17a). The Golf Course's liquor clientele is 50 to 65% Indian (Pet. App. 18a).

Adjacent to the City of Mission boundaries are two residential concentrations that are closer to Mission than is the Golf Course. Approximately 0.3 miles east of Mission's municipal boundary is an area known as East Antelope or simply Antelope. Most of the housing in East Antelope has been constructed since 1965 by the Rosebud Housing Authority, and is occupied almost exclusively by Indians. See Pet. 6; Pet. App. 10a-12a. The 0.3 mile gap between Mission and East Antelope is filled with businesses and Sinte Gleske College that residents of both Mission and East Antelope patronize. Contiguous with Mission's southern boundary, but also outside the City, is an area known as the Todd County school complex. The two schools located there are attended primarily by Indians. High school boarding students, teachers, and Bureau of Indian Affairs employees live on the complex. See Pet. App. 13a.

In 1980, Mission and the area immediately around Mission, including East Antelope and the Todd County school complex, had a total population of 1,737 persons, of which 69% (1,203 persons) were Indian (Pet. App. 11a-12a). The

City of Mission had a total population of 748 persons, 50.28% of which were Indian (Pet. App. 11a).[1]

3. The United States filed companion civil actions for declaratory and injunctive relief against petitioners, seeking to enjoin their sales of liquor except in conformity with the Rosebud Sioux Tribe's liquor ordinance. Petitioners admitted selling liquor without tribal licenses, but contended that their sales took place on fee-patented land in a non-Indian community, and that they accordingly were not within Indian country for purposes of 18 U.S.C. 1154 and 1156. See page 7 note 6, *infra*.[2] Based on the facts developed at trial and in a stipulation, from which the district court derived its findings (Pet. App. 10a-18a), the court had "little difficulty" in concluding that petitioners' liquor-dispensing establishments "are not located within non-Indian communities" (Pet. App. 18a). The district court rejected petitioners' contention that the court was "limited [as a matter of law] solely to an examination of the City of Mission within its legal boundaries" and found — as a matter of fact — an "element of cohesiveness" which precluded treating the City as a "community" separate from the surrounding residential areas, East Antelope and the school complex (Pet. App. 19a-20a).

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[1]Petitioners' establishments are centrally located in Todd County, South Dakota (Pet. App. 10a). Since 1930 the Indian share of the population of Todd County has increased from 47% to 78% (Pet. App. 11a).

[2]Petitioners also asserted that regulation of their liquor sales under the tribal liquor ordinance would violate the Due Process and Equal Protection Clauses of the United States Constitution because non-Indians cannot vote in tribal elections and because the liquor ordinance might be administered in a racially discriminatory fashion. The lower courts rejected these constitutional claims (Pet. App. 21a), which are not renewed here.

The district court permanently enjoined petitioners from selling liquor except in conformity with 18 U.S.C. 1161 and the Rosebud Sioux tribal liquor ordinance (Pet. App. 5a). The court of appeals affirmed on the basis of the district court's "well reasoned opinion" (Pet. App. 3a-4a), noting that "the record indicates that ample evidence was presented demonstrating that [petitioners] did not fall within the statutory exception" (Pet. App. 3a n.2).

4. The petition for writ of certiorari was filed on October 7, 1983.[3] With it, petitioners lodged 24 exhibits that are not part of the record below. On or about October 17, 1983, petitioners filed in the district court a motion pursuant to Fed. R. Civ. P. 60(b) to set aside the judgment on the basis of these and other exhibits. In their Rule 60(b) application, petitioners present the same argument that they do here —*i.e.*, that in determining the applicability of the non-Indian community exemption from federal Indian liquor laws the courts below should have restricted their consideration to the City of Mission proper.

ARGUMENT

The question presented by the petition concerns only the application of settled law to the particular facts of this case. The factual determination that East Antelope, Mission, and the school complex are a cohesive community, and that the City of Mission accordingly should not be regarded as a separate non-Indian community, establishes no precedent, much less a precedent of general importance. The decision below does not conflict with any decision of this Court or any other court of appeals. Review by this Court accordingly is not warranted.

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[3]Petitioners' application for a stay pending filing and disposition of their petition for a writ of certiorari was denied on July 22, 1983, by Justice Blackmun.

1. Although petitioners contend (Pet. 16-17) that the district court misapplied *United States* v. *Mazurie*, 419 U.S. 544 (1975), by "refus[ing] to consider whether the City of Mission is itself a 'community' within the meaning of the non-Indian community provision", they point to nothing in *Mazurie* that supports their arguments. Contrary to petitioners' assertions, the district court did not hold, and we certainly do not argue, that a city *cannot* constitute a "community" which may in fact be legally outside Indian country for purposes of 18 U.S.C. 1154(c) and 1156. Nor did the lower courts decide as a matter of law to ignore Mission's boundaries. Instead, the district court simply rejected petitioners' contention that applicable law *requires* that, in determining the availability of the non-Indian community exemption, it limit its consideration to the City proper. The district court then found from the evidence in the record an "element of cohesiveness" that precluded treating Mission as a "community" separate from its surrounding area (Pet. App. 18a-20a).

The district court's analysis accords with relevant precedents. The court properly examined the area surrounding the subject liquor establishments (Mission and environs) to determine the nature and scope of the community in which they are located. See, *e.g.*, *Mazurie*, 419 U.S. at 551-552; *United States* v. *Morgan*, 614 F.2d 166, 169-170 (8th Cir. 1980).[4] The district court considered the pertinent evidence in light of the factors that define a community as summarized in *Morgan*, 614 F.2d at 170:

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[4]Petitioners apparently do not contend that it was error to consider such evidence. Petitioners state: "There is certainly no question that the territory surrounding the liquor establishment in question is to be examined in determining whether or not it is within a non-Indian community" (Pet. 17).

> Basic to the definitions of "community" which we have reviewed is the existence of an element of cohesiveness. This apparently can be manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality.[5]

Under this sensible approach the legal boundaries of any incorporated local government entity are a relevant consideration, but are not dispositive, in determining the "community" of reference. See also *Berry* v. *Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 940 (D. Wyo. 1976) ("community" defined for purpose of 18 U.S.C. 1154(c) as "a unified body of individuals * * * with a common interest living in a particular area; an interacting population of various kinds of individuals in a common location").[6]

Applying this standard, the district court found "an element of cohesiveness" that precluded treating Mission as a community distinct from its environs (Pet. App. 19a-20a). The record amply demonstrates that the economic and social patterns of the area bear little relationship to the City of Mission's geographic boundaries. Mission and the adjoining housing areas comprise a single cohesive community that clearly is not "non-Indian." See pages 3-4, *supra*.

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[5]In *Morgan*, decided subsequent to this Court's decision in *Mazurie*, the court of appeals held bars located within the Standing Rock Sioux reservation to be located in non-Indian communities, rejecting the Standing Rock Sioux Tribe's assertion that a "community" is for these purposes limited to an incorporated village or town (614 F.2d at 170).

[6]Indeed, petitioners insist that Mission Golf Course is part of the City of Mission "community" even though it is two miles outside city limits. At the same time, petitioners would exclude from the relevant community the Indian residential concentrations located closer to the city than is the golf course.

We agree with petitioners that *Mazurie* does not dictate that municipal boundaries be ignored. But neither does *Mazurie* dictate that the residents of the school complex and East Antelope be excluded from the relevant community simply because they reside outside the geographical boundaries of the City of Mission. Indeed, the Court rejected, in *Mazurie*, the claim that proof concerning the nature of the community must be "keyed to a geographical area with precise boundaries" (419 U.S. at 552). Under different factual circumstances, a court might properly conclude that a municipality such as Mission was by itself the community of reference. But, upon the facts appearing in the record of this case, no such a conclusion was warranted, much less required.[7] Certainly there is no plain error in the finding of the two courts below that Mission and its environs are one cohesive community.

2. Because the courts below did not hold that the reference community may never be limited to a city or town for 18 U.S.C. 1154 purposes, petitioners' discussion (Pet. 18-23) relating to the commonly understood meaning of community is misdirected. In any event, Congress's use of the non-technical term "community" in place of readily available terms such as "municipality" that call for reference to an incorporated entity, supports the analysis of the courts below.

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[7]Petitioners' apparent suggestion (Pet. 22) that only independent city services, history, and demographic composition of the resident population may be considered in determining whether a community is non-Indian can not be squared with the factors actually considered in *Mazurie* and *Morgan*. Rather, factors such as land ownership, degree of Indian business and social activities, the demographic composition of the liquor-buying clientele, and the demographic composition of the schools attended by children are also relevant. The district court considered the full range of applicable factors here in determining that "it cannot be said that [the non-Indian] elements [in the area] predominate" (Pet. App. 19a-20a).

Nor does the documentation lodged with this Court by petitioners show that the judgment below is contrary to the congressional intent behind enactment of the non-Indian community exception. As noted above (page 5), these documents are not part of the record. For this reason, presumably, petitioners have now moved in district court based on these and other documents to set aside the judgment. The possibility that petitioners may obtain relief from the judgment on their Rule 60(b) motion in the district court makes their case all the less suitable for review by this Court.

We have opposed petitioner's district court motion for relief from the judgment on the ground that the documents in question reflect at most the hope of certain individuals that Congress would exempt the City of Mission from Indian Country liquor laws. Nothing in the published legislative history or, for that matter, the unpublished private materials adduced by petitioners, suggests that Congress adopted the non-Indian country exemption, which is stated in generic terms, with the purpose or intent of achieving that specific result.

Even if the non-Indian community exception had been enacted in 1949 in contemplation of excepting Mission from the then absolute prohibition of liquor in Indian country, the classification of Mission as a non-Indian community over thirty years ago would not be determinative today. The demography and social environment of Mission and its immediate vicinity have not remained static since 1949.[8]

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[8]For example, construction of most of the East Antelope housing adjacent to Mission's east boundary occurred after 1965 (Pet. 6). The Indian population within the boundaries of Mission has increased from 33% of the total population in the 1940 census to a slight majority in the 1980 census (Pet. App. 17a). Indian participation in the Golf Course has increased since it was founded in 1965 by non-Indians so that by 1980, 50% of the members were Indians (Pet. App. 19a).

The generic language of the non-Indian community exemption grants petitioners no perpetual exemption from federal laws designed to protect Indians from abuses relating to the sale of alcohol.

3. Petitioners contend (Pet. 24) that the lower courts' decisions "directly and substantially conflict[]" with decisions that have treated Indian housing developments, such as East Antelope, as distinct communities for purposes of determining whether such residential areas are "dependent Indian communities" within the meaning of 18 U.S.C. 1151(b).[9] The two cases upon which petitioners rely both arise from within the Eighth Circuit, which could of course resolve any intra-circuit conflict — if one in fact, existed. But the alleged conflict is illusory.

Instead, the allegedly discrepant results on which petitioners rely merely reflect application of consistent legal principles to the particular records of the cases. For example, in *United States* v. *South Dakota*, 665 F.2d 837 (8th Cir. 1981), an Indian housing project was held to be a dependent Indian community. There the State argued for the first time on appeal that the entire City of Sisseton, South Dakota — rather than the housing project — was the proper community of reference (665 F.2d at 841). The Eighth Circuit declined to consider the issue because the State had not raised the argument at trial (*ibid.*). Nor does the judgment here conflict with *United States* v. *Mound*, 477 F. Supp. 156 (D. S.D. 1979), a criminal case brought by the United States against several Indian defendants. Defendants there challenged the United States' jurisdiction alleging

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[9]Indian country is defined by 18 U.S.C. 1151(b) to include "dependent Indian communities" regardless of location. Dependent Indian communities that are not on Indian reservations accordingly are subject to federal criminal jurisdiction in the same manner as Indian reservations. See 18 U.S.C. 1151-1153.

that the crimes occurred outside an Indian reservation at an Indian housing project at Eagle Butte, South Dakota. From the court's opinion it appears that defendants never questioned the scope of the community of reference. The opinion focuses entirely on whether the housing development itself was both "dependent" and "Indian" for purposes of 18 U.S.C. 1151(b).

Petitioners also suggest (Pet. 26) that in *United States* v. *Morgan, supra*, the Eighth Circuit failed to treat an Indian housing project located adjacent to McLaughlin, South Dakota, as part of the non-Indian community of McLaughlin. Petitioners may know that such an Indian housing project in fact exists outside McLaughlin, but that "fact" was neither mentioned nor considered by the court of appeals. In *Morgan*, the United States and the Standing Rock Sioux Tribe conceded that McLaughlin was a "non-Indian community," but urged that the bar in question —which lay outside the city's municipal boundaries — was simply not a part of that "community." The Eighth Circuit rejected that argument (614 F.2d at 170), and certainly did not indicate that there was any basis in the record from which it might conclude that the bar was part of a larger, predominantly Indian, community of reference.[10]

* * * * *

In sum it is petitioners, not the courts below, whose analysis rests on the faulty "assumption that a community is a monolithic entity which is mutually exclusive of other communities" (Pet. 27). The judgment here rests on precisely the fact-sensitive, "flexible" concept of community

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[10]In any event, the scope of the community of reference is highly dependent on the factual setting in which a case arises, and the question is not identical in every legal context. Thus, a finding that an Indian housing development constitutes a *dependent* Indian community in one locale does not require that East Antelope be considered a *separate* Indian community in this context. Cf. Mazurie, 419 U.S. at 553 n.10.

(*ibid.*) that petitioners purport to espouse. Further review by this Court of the basically factual determination in this case would be inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-606

CITY OF MISSION, SOUTH DAKOTA; AND
MISSION GOLF COURSE, INC.

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT

The Response of the United States to the Petition vividly illustrates some of the pervasive and serious consequences of the decision of the court below. To begin with, the United States acknowledges that under the analysis espoused by the lower court, application of the "non-Indian communities" provision (18 U.S.C. §§ 1154(c) & 1156) is not "static." Brief for the United States In Opposition at 9. Indeed, as the provision is now being applied, it is easy to envision different results obtaining in different years with changes in such factors as federal programs and demographic characteristics. Because the analysis employed by the lower court is so easily susceptible of fluctuation, there is no foreseeable end to litigation either in this particular case or in this context generally. A major fear of both the Petitioners and the Amici States

is that the decision below will in fact invite more litigation in this area. See, e.g., Petition at 14-15. It is fair to say then, that the approach used by the lower court does not allow for the certainty and predictability so important in the jurisdictional context. While the Petitioners are certainly not suggesting that application of the provision should, once determined, be permanently set, it is unlikely that Congress intended that application of the provision would be an ever-changing process, continually causing jurisdictional confusion and uncertainty as is occurring now. See, e.g., Brief of the States of South Dakota, et al., as Amici Curiae in support of the Petition.

This leads to a second major deficiency in the approach espoused by the lower court. It is true, as the United States points out, that application of the provision is, to

some extent at least, "fact-sensitive" (Br. for U.S., at 11). See, e.g., United States v. Mazurie, 419 U.S. 544 (1975). This factual examination, however, should not displace the threshold inquiry required when examining a federal enactment -- congressional intent. It is this inquiry which gives the statutory provision at issue form and substance, and at the same time, provides the Court with important perspective and guidance. See, e.g., Norfolk Redevelopment and Housing Authority v. C & P Telephone Co. of Va., 52 U.S.L.W. 4007, 4009 (Nov. 1, 1983) (statutory language to be interpreted "'in light of the purposes Congress sought to serve.' ..."). Yet, in the instant proceeding, the lower court applied the non-Indian community provision without conducting this crucial analysis, and the United States now advocates that such an analysis would be "misdirected." Br. for

U.S., at 8. From the Petitioners' perspective, it is precisely because this inquiry was not conducted here that there is now uncertainty and confusion.

While the United States disclaims that the analysis of the lower court rests upon the assumption that a community is a monolithic entity separate of other communities (Br. for U.S., at 11), its application produces precisely that result. As the term "community" is a broad, flexible one, there is commonly more than one community in any area (e.g., business, social, cultural, political, educational). These communities may overlap with one another or one may be located entirely within another. Under the analysis of the lower court, however, a geographic area with any common interests is defined as the one referent community, and that community is

then examined to determine whether it is Indian or non-Indian. See Pet. App. at 19a-20a. In view of the flexibility and breadth of the term, the more realistic approach would be to examine the various types of communities actually existing in the area and assess their non-Indian character. It may well be that Congress did not intend that the non-Indian community provision would encompass all communities as the term is ordinarily understood; more likely, Congress probably had political and economic communities primarily in mind. Nevertheless, it is evident that the approach espoused by the lower court results in an unnecessarily constricted application of the term "community" which is not rooted

in reality.[1]

Lastly, the United States unfairly suggests that the Motion recently filed by the City of Mission and Mission Golf Course in the District Court, under Rule 60(b)(2) of the Federal Rules of Civil Procedure, to set aside the judgment on the basis of newly discovered historical documentation, makes this case "all the less suitable for review by this Court." Br. for U.S., at 9. While the Petitioners believe that their motion is a substantial one, it is important to keep in mind that Rule 60(b)(2) motions are generally looked upon with "'disfavor'" in the Eighth Circuit. Dabney v. Montgomery

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1. The United States also argues that while corporate limits are not dispositive, they are relevant to the inquiry. Br. for U.S., at 7. On the contrary, if "cohesiveness" is to be the sole focus of inquiry as the United States suggests (Br. for U.S., at 7), it is difficult to conceive of when corporate boundaries would ever be relevant.

Ward & Co., Inc., 692 F.2d 49, 52 (8th Cir. 1982), quoting Edgar v. Finley, 312 F.2d 533, 536 (8th Cir. 1963). And, when such motions are denied, the denial is subject to reversal on appeal for abuse of discretion only. See, e.g., United States v. Walus, 616 F.2d 283, 288 (8th Cir. 1980). It is evident then, that the instant Petition may well be the only time that the City and Golf Course can present the merits of their case to the Court for review. Therefore, the Rule 60(b)(2) motion should not play a role in the consideration and disposition of the Petition.[2]

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2. One last point bears mention here. While the United States correctly observes that the Court of Appeals in United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, ____ U.S. ____ (1982), thought that the community issue had not been raised in the court below (Br. for U.S., at 10), it is apparent that the District Court did in fact consider that issue. See United States v. South Dakota, 7 Indian

CONCLUSION

WHEREFORE, for the foregoing reasons, and for the reasons set forth in the Petition and the supporting States' Amici Brief, the Petition for Writ of Certiorari should be granted.

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(cont.)

L. Reporter 3148, 3149 (D.S.D. Sept. 8, 1980) ("The State's second principal contention is that the housing project is so closely related to the City of Sisseton that it could not possibly be considered a dependent Indian community....").

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NO. 83-606

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CITY OF MISSION, SOUTH DAKOTA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE STATES OF SOUTH DAKOTA, MONTANA AND IDAHO AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Did Congress, when it excluded "fee-patented lands in non-Indian communities" from the definition of Indian country in 18 U.S.C. §§ 1154(c) and 1156, intend that the term "community" would include municipalities, such as Mission, South Dakota; and if so, whether Mission, which is incorporated and functions under State law and has a substantial non-Indian population, is "non-Indian" for purposes of those laws?

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NO. 83-606

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CITY OF MISSION, SOUTH DAKOTA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

INTEREST OF THE AMICI STATES OF SOUTH DAKOTA, MONTANA AND IDAHO

Well-defined jurisdictional lines are vital to the law enforcement officials of any state. For the most part, the jurisdictional authority of a state within an Indian reservation is set by federal law. The proper

delineation and interpretation of these jurisdictional limits is particularly important to the Attorneys General of the amici States because of the number of Indian reservations, as well as numerous parcels of off-reservation trust land and potential dependent Indian communities located within those States. There are at least six recognized Indian reservations in South Dakota, seven in Montana and five in Idaho. Like all states, the amici States regulate liquor traffic as part of their general "police power", recognizing that they have a duty to balance effectively the well-known deleterious effects of alcohol availability against the responsible consumption of alcoholic beverages which numerous citizens, both on and off Indian reservations find enjoyable.

Most of the Indian Reservations in South Dakota, Montana and Idaho are not isolated, purely Indian enclaves. In Montana, for

example, the total population of the five reservations, where liquor transactions take place, is approximately 39,900 people.[1] More than half of this population--approximately 23,360--are non-Indians. For instance, approximately eighty-seven percent (15,852) of the 19,628 people on the Flathead Indian Reservation are non-Indian; approximately fifty-six percent (5,648) of the 9,921 people on the Fort Peck Indian Reservation are non-Indian; and approximately twenty-five percent (1,578) of the 6,660 on the Black Feet Indian Reservation are non-Indian.[2]

---

[1] Montana operates liquor stores on the five Indian Reservations where alcohol sales take place. For example, the total sales in those state stores alone amounted to $2,497,222 in fiscal year 1981. Many of these state stores are within the boundaries of incorporated cities or towns on the reservation.

[2] The source for this information is Census of Population and Housing, 1980: P.L. 94-171, Population Counts, Summary tape file.

Moreover, most of the reservation in the amici States have large areas of fee-patented land within their boundaries. Located within these areas are a number of incorporated municipalities. In many cases, large percentages of the on-reservation non-Indian populations reside within the corporate city or town limits within the Indian reservations, where the states have issued liquor licenses. And, the liquor regulation laws of the amici States are all-encompassing.

Obviously, the amici States have an important interest in insuring that their state-wide liquor licensing and regulation remains in tact. "Indian Country", as defined in 18 U.S.C. §§ 1154(c) and 1156, specifically excludes fee-patented lands in non-Indian communities from the application of the federal Indian liquor laws, and therefore from the need for compliance with tribal

liquor ordinances. See, for example, Rice v. Rehner, ___ U.S. ___, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). It is of vital importance to the amici States that they be able to determine with reasonable certainty whether a given area or population within an Indian reservation is a "non-Indian Community", for purposes of the federal liquor laws. This is especially important because of the large non-Indian populations on Indian reservations in the amici States. It is also important because the Amici have been confronted with tribal ordinances providing for exclusive tribal licenses or restricting tribal permits to enrolled tribal members.

In this action, the lower federal courts have disregarded the common meaning of the term "community" to determine that the "non-Indian community" exclusion does not apply to the City of Mission, South Dakota, and the

Mission Golf Course. In making this particular determination, the United States District Court for the District of South Dakota used an analysis that is very similar to the analysis established by the Court of Appeals to define a "dependent Indian community," as that term is used in 18 U.S.C. § 1151.

The lower courts' decision in this matter has therefore inextricably intertwined the analysis of the "non-Indian community" question with the analysis of the "dependent Indian community" question. Both of these determinations will likely have a great impact upon the jurisdiction possessed by the amici States in relation to both the Indian tribes and the federal government. As the state officials charged with the duty to represent their States in all legal matters, the Attorneys General of the amici States are very interested in insuring the propriety of

the determination of whether an area is, in fact, a "non-Indian community" under the appropriate federal statutes. A determination of whether a given population or area is a "non-Indian Community" must be made in a way that is fair, reliable, and consistent. To make such a fair, reliable, and consistent determination demands that incorporated cities and town limits on Indian reservations not be ignored.

FEDERAL STATUTES INVOLVED

The following federal statutes are involved in this matter:

(a) 18 U.S.C. § 1151:

> Except, as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent

Indian communites within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

(b) 18 U.S.C. §§ 1154(a) and (c):

(a) Whoever sells, gives away, disposes of, exchanges, or barters any malt, spirituous, or vinus liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, except for scientific, sacramental, medicinal or mechanical purposes, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government, under charge of any Indian superintendent, or to any Indian, including mixed bloods, exercises guardianship, and whoever introduces

or attempts to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, shall, for the first offense, be fined not more than $500 or imprisoned not more than one year, or both; and, for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

* * * *

(c) The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(c) 18 U.S.C. § 1156:

Whoever, except for scientific, sacramental, medicinal or mechanical purposes, possesses intoxicating liquors in the Indian country or where the introduction is prohibited by treaty or an Act of Congress, shall, for the first offense, be fined not more than $500 or imprisoned not

more than one year, or both; and for each subsequent offense, be fined not more than $2,000 or imprisoned not more than five years, or both.

The term "Indian country" as used in this section does not include fee-patented lands in non-Indian communities or rights-of-way through Indian reservations, and this section does not apply to such lands or rights-of-way in the absence of a treaty or statute extending the Indian liquor laws thereto.

(d) 18 U.S.C. § 1161:

The provisions of sections 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.

REASONS FOR GRANTING THE PETITION

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the United States District Court for the District of South Dakota, United States v. Mission Golf Course, Inc., 548 F.Supp. 1177 (D.S.D. 1982), which was affirmed by an unpublished per curiam decision by the Court of Appeals, United States v. Mission Golf Course, Inc., No. 82-2516 (8th Cir. May 16, 1983), held that the City of Mission and the Mission Golf Course must conform to the tribal liquor ordinances of the Rosebud Sioux Tribe before they can engage in the sale of intoxicating liquor within the borders of the reservation. This conclusion is based on the lower courts' determination that the City of Mission was

not a "non-Indian community." A "non-Indian community" is excluded from the requirement to observe tribal liquor laws by the provisions of 18 U.S.C. §§ 1154(c) and 1156. The District Court, and the Court of Appeals through its affirmance of the District Court's decision, based this conclusion on a reading of this Court's decision in United States v. Mazurie, 419 U.S. 544 (1975).

As is set out in detail in the Petition, the lower courts misapplied the holding from the Mazurie decision. Because the States concur with the Petitioners' analysis in this regard, a detailed argument on this point will not be made. One significant area, however, will be discussed. Even after Mazurie, in the context of the "non-Indian community" exclusion at question here, a city or town was understood to be a "community." Mazurie simply stated, in response to a constitutional vagueness argument, that the

term "community" was not limited to cities and towns. Mazurie, 419 U.S. at 552-553. The lower courts, however, misconstrued this holding. The District Court in this case engaged in an extensive examination of the surrounding territory to determine whether a "community" existed. This is inconsistent with this Court's decision in Mazurie. see also, United States v. Morgan, 614 F.2d 166 (8th Cir. 1980). It is also inconsistent with the congressional intent exhibited in relation to sections 1154(c) and 1156 at the time they were enacted. See, H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949); S.Rep. No. 303, 81st Cong., 1st Sess. (1949). For this reason the Petition of the City of Mission and the Mission Golf Course should be granted.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented in this Petition has never been directly addressed by this Court. When this fact is coupled with the fact that the lower courts have seriously misapplied this Court's prior decision dealing with the "community" determination under sections 1154(c) and 1156, the reasons for granting the Petition become more compelling.

The reasons for granting the Petition are further enhanced by the fact that the lower courts have also misapplied their own precedent from the related area involving the "dependent Indian community," as that term is used in 18 U.S.C. § 1151(b), in making the "community" determination necessary under sections 1154(c) and 1156. This decision therefore causes confusion not only in the "non-Indian community" context, but in the "dependent Indian community" context as well. A decision by this Court is necessary to eliminate this confusion.

Finally, the amici States submit that the practical problems necessarily related to a case-by-case determination of whether a certain municipality is a "community" within the provisions of sections 1154(c) and 1156 require a definitive resolution by this Court. This Petition presents the Court with the opportunity to provide this resolution.

A. The "community" determination within the context of the "dependent Indian community."

Not only is the "community" determination made by the lower courts in this case inconsistent with this Court's decision in Mazurie, but it is also inconsistent with its own decisions in the related area of the "dependent Indian community," as that term is used in 18 U.S.C. § 1151(b).[3] These decisions

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[3] The District Court raised the "dependent Indian community" question when it made the following observaton:

> Though not directly on point, several other cases deal with the

have held that cities and towns are "communities" with the meaning of this jurisdictional statute. Morgan, supra; United States v. Mound, 477 F.Supp. 156 (D.S.D. 1979); Weddell v. Meierhenry, 636 F.2d 211 (8th Cir. 1980), cert. denied, 451 U.S. 941 (1981); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. denied, ___ U.S. ___, 103 S.Ct. 52, 74 L.Ed.2d 58 (1982).[4]

> question of what constitutes a dependent Indian community under 18 U.S.C. § 1151(b), and establish factors which are relevant to the Court's inquiry here.

Mission Golf Course, 548 F.Supp. at 1179 (citations omitted.)

[4] Although not an issue in this Petition, it is at least the position of the State of South Dakota that the United States Court of Appeals for the Eighth Circuit has also misinterpreted this Court's decisions dealing with the determination of "dependent Indian communities" under 18 U.S.C. § 1151(b). The Court of Appeals has required extensive factual findings in order to make the determination of whether a certain parcel of land is to be considered a "dependent Indian

This series of decisions dealing with the "community" determination under section 1151(b), when combined with the lower courts' decision in this case dealing with the "community" determination under sections 1154(c) and 1156, effectively eliminates any judicial consistency in the "community" determination. The only consistency in these cases is that the lower courts have taken a position favoring federal jurisdiction. If federal jurisdiction can be determined by considering

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community." This procedure is unnecessary. The term "dependent Indian community," as it was codified in 18 U.S.C. § 1151(b), is based upon this Court's decisions in United States v. Sandoval, 231 U.S. 78 (1913), and United States v. McGowan, 302 U.S. 535 (1938). In each of these decisions, the Court states that only Congress can make the determination of whether or not certain parcels of land are within federal jurisdiction. The key inquiry, therefore, is whether Congress had manifested an intent to have a particular community recognized as a "dependent Indian community" requiring the special guardianship and protection of the United States. The process created by the Eighth Circuit certainly goes beyond the very limited review required by this Court.

a city or town to be a "community" by itself, the courts have been willing to so hold. On the other, if the surrounding area must be considered in order to reach a conclusion that the area is under federal jurisdiction, the courts have been willing to ignore corporate boundaries. The latter is precisely what occurred in the instant litigation.[5] Because of the inconsistencies and uncertainties involved in this analysis, the

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[5] In this particular case, the question revolves around a relatively small municipality in south-central South Dakota. There are, in fact, large municipalities, such as Tacoma, Washington [Puyallup] and Green Bay, Wisconsin [Oneida], which have opened Indian reservations within their exterior boundaries. See also, Transcript of Oral Argument 24-25, Rice v. Rehner, ___ U.S. ___, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983). An interpretation of the "non-Indian community" exclusion in sections 1154(c) and 1156 by the federal courts of appeal in which these larger municipalities are located and which would follow the precedent set by the lower courts in this case could have a profound effect on liquor licensing requirements within these municipalities.

Petition should be granted so that this Court can resolve this important jurisdictional question, and set some guidelines for future matters involving the "community" determination found in sections 1151(b), 1154(c) and 1156.

B. The problems affecting local officials

The inconsistencies in the lower courts' analysis, as highlighted in this brief, and as detailed in the Petition, have created and will continue to create serious problems for the officials of the State of South Dakota and potentially, for the other amici States because of the jurisdictional uncertainties created by the decision. The present judicial standard--the favoring of federal jurisdiction--is no standard at all.

The decision of the lower courts will invite continued litigation over whether a certain city or town is a "community" within

sections 1151(b), 1154(c) and 1156. Prior to the instant decision, this was not an issue because such entities were considered "communities." Such case-by-case adjudication can only lead to more jurisdictional uncertainties and problems. The problems and confusion created by the lower courts' ruling in this case affect not only the state, but also federal and tribal officials. A decision by this Court on the issue of the "community" determination under sections 1151(b), 1154(c) and 1156 is needed to eliminate these problems and confusions.

CONCLUSION

Based on the foregoing arguments and authorities, the State of South Dakota, Montana and Idaho, as amici curiae in support of the Petitioners City of Mission, South Dakota and Mission Golf Course, pray that the Petition for Writ of Certiorari be granted.

The amici States also join in the Petitioners' alternative request for summary reversal of the decision of the lower federal courts in this matter.

Respectfully submitted,

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